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No. 78-820

In the Supreme Court of the United States

OCTOBER TERM, 1978

REPUBLIC STEEL CORPORATION, PETITIONER

v.

DOUGLAS M. COSTLE, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (*"Republic Steel II"*) is reported at 581 F.2d 1228. The initial opinion of the court of appeals (*"Republic Steel I"*) is reported at 557 F.2d 91.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1978. The petition for a writ of certiorari was filed on November 17, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Water Pollution Control Act Amendments of 1972, as amended by the Clean Water Act of 1977, authorize the Administrator of the Environmental Protection Agency to disapprove state-issued National Pollutant Discharge Elimination System ("NPDES") permits that do not require the achievement, by July 1, 1977, of effluent limitations requiring the application of the best practicable control technology currently available.

STATEMENT

1. The Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 *et seq.*, establish the "national goal that the discharge of pollutants into the navigable waters be eliminated by 1985" (33 U.S.C. 1251(a)(1)). Congress sought to achieve that goal in several stages. By July 1, 1977, polluters were required to achieve levels of discharge consistent with "the best practicable control technology currently available" (Section 301(b)(1)(A)), and by July 1, 1983 (now July 1, 1984), they must reach levels consistent with "the best available technology economically achievable" (Section 301(b)(2)(A)). See *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 121 (1977); *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204 n.11 (1976). The accomplishment of these successive levels of pollution control is insured through a system of permits for individual sources of pollution.

The permit system is established by Section 402 of the statute. No person may discharge any pollutant after December 31, 1974, without a permit (Sections 301(a) and 402(k)), and no permit may be issued that does not require the achievement of levels of effluent consistent with the best practicable control technology by July 1, 1977 (Section 402(a)(1) and Section 301(b)(1)(A)). The permits may be issued by the Administrator of the Environmental Protection Agency or by states that have instituted permit programs approved by the Agency (Section 402(b)). The Administrator may disapprove state-issued permits that are "outside the guidelines and requirements" of the statute (Section 402(d)(2)).

Although the Act authorizes the issuance of permits with conditions specified on a case-by-case basis (Section 402(a)(1)), Congress required the Administrator to promulgate nationwide "regulations, providing guidelines for effluent limitations," for each industry by October 18, 1973 (Section 304(b)). These guidelines are to specify, *inter alia*, the "[f]actors relating to the assessment of best practicable control technology currently available" (Section 304(b)(1)(B)).

But "[t]he various deadlines imposed on the Administrator were too ambitious for him to meet." *E. I. du Pont de Nemours & Co.* v. *Train*, *supra*, 430 U.S. at 122. The Administrator was unable to promulgate guidelines for the hundreds of industries within the time fixed by Congress. See generally *Natural Resources Defense Council, Inc.* v. *Train*,

510 F.2d 692 (D.C.Cir. 1975). Of particular relevance in this case, the Administrator did not promulgate guidelines for primary operations in the carbon steel industry until June 28, 1974 (39 Fed. Reg. 24114), and even then a court of appeals held that the guidelines were defective in part. *American Iron and Steel Institute* v. *EPA*, 526 F.2d 1027 (3d Cir. 1975).[1] Similarly, the Agency published regulations for alloy and stainless steel operations only on March 29, 1976 (41 Fed. Reg. 12990), and, while the technological choices were sustained in their entirety, the regulations were invalidated for lack of sufficient notice. *American Iron and Steel Institute* v. *EPA*, 568 F.2d 284 (3d Cir. 1977).

2. In July 1972, petitioner applied for a permit to discharge pollutants into navigable waters from its mill in Canton, Ohio. This application was pending in March 1974, when the Environmental Protection Agency approved Ohio's permit program. The Agency consequently transferred petitioner's application to the Ohio Environmental Protection Agency ("Ohio") (Pet. App. 16a).

Ohio issued a draft permit to petitioner on June 10, 1974 (Pet. App. 17a). The draft permit required compliance by June 1976 with Ohio's assessment of the volume of discharge consistent with best practica-

[1] On August 10, 1977, the court of appeals recalled its mandate in part, concluding that its invalidation of the form of the regulations was erroneous in light of this Court's subsequent decision in *du Pont. American Iron and Steel Institute* v. *EPA*, 560 F.2d 589 (3d Cir. 1977).

ble technology. Petitioner, seeking more favorable permit conditions, initiated prolonged negotiations with the state agency (*ibid.*). On August 1, 1975, petitioner and Ohio agreed on discharge levels less stringent than those established in the draft permit. Furthermore, after additional administrative proceedings, Ohio extended the compliance schedule to give petitioner until February 1, 1979, within which to achieve the level of control required by the permit (Pet. App. 18a).

In January 1976, Ohio transmitted this permit to the Agency for approval. The Agency refused to approve the permit on March 30, 1976 (Pet. App. 28a-31a). While the Agency did not dispute Ohio's assessment of the level of effluent that would be consistent with the best practicable control technology, it concluded that the February 1, 1979, compliance deadline set by the state permit did not satisfy the July 1, 1977, deadline established by Section 301(b)(1)(A) of the Act.

3. Petitioner sought review of the Agency's decision in the court of appeals. The court concluded that the issuance of guidelines under Section 304(b) to define the best practicable technology for each industry is a condition precedent to application of the July 1, 1977, compliance deadline specified in Section 301(b)(1)(A) of the Act. *Republic Steel I* (Pet. App. 14a-26a). Although the court acknowledged that the statutory deadline is inflexible on its face and that the "legislative history is replete with statements attesting to the inflexible nature of

the administrative timetable" (*id.* at 21a), it nevertheless concluded that Congress had not contemplated that compliance with effluent limitations would precede issuance of nationwide guidelines. The court thus held "that section 301(b)(1)(A)(i) is made unenforceable by the Administrator's failure to promulgate necessary regulations * * * [and] that the July 1, 1977, deadline is no longer an 'applicable requirement' of the Act" (*id.* at 24a).

4. The Environmental Protection Agency petitioned for a writ of certiorari to review the decision in *Republic Steel I. Costle* v. *Republic Steel Corp.*, No. 77-631. On December 27, 1977, while the Agency's petition was pending, Congress passed the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, which amended the 1972 Act in several respects. The new legislation recognized that the July 1, 1977, best practicable technology deadline is inflexible (see Pet. App. 4a), but it gave the Administrator discretion to extend the deadline in particular cases under Section 309 of the Act. On January 16, 1978, this Court granted the petition and summarily vacated and remanded the case to the court of appeals "for further consideration in light of Public Law 95-217." 434 U.S. 1030.

5. On remand, the court of appeals upheld EPA's disapproval of the permit and dismissed Republic's petition for review. *Republic Steel II* (Pet. App. 1a-12a). In light of the 1977 amendments, the court held that "[t]he import of the statute is now plain: the July 1, 1977, deadline cannot be waived by the courts. To the extent that noncompliance occurs despite good faith efforts as defined in [new] § 309(a)(5)(B), relief is available only via discretionary extension of the deadline by the Administrator" (*id.* at 5a-6a).

ARGUMENT

The decision of the court of appeals is correct and presents no issue warranting review by this Court.

1. The Federal Water Pollution Control Act Amendments of 1972 established a multi-stage program for achieving the national goal of eliminating water pollution by 1985. The first major stage—limitation of effluents to those consistent with "the best practicable control technology currently available" ("BPT")—was to be achieved by July 1, 1977 (Section 301(b)(1)(A)). The language and legislative history of the Act support the court of appeals' conclusion that the 1977 deadline is inflexible and may not be extended in NPDES permits.[2]

Petitioner's principal contention (Pet. 9-11)—that the duty to limit effluents consistently with the best practicable technology by July 1, 1977, was conditioned on the Administrator's timely promulgation of guidelines defining the best practicable technology (Section 304(b)(1)(B))—is based upon a misunderstanding of the role of the guidelines in the statutory plan. The Act does not require compliance with the guidelines by July 1, 1977, or any other date;

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[2] See, *e.g.*, U.S. Library of Congress, Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong., 1st Sess. 162, 231, 1461 and 1691 (Comm. Print 1973).

it requires that polluters achieve by that date a level of discharges consistent with application of the best practicable technology. The guidelines assist the permit issuers in implementing the statutory requirement, but the requirement itself exists independently of the guidelines.[3]

Congress provided in Section 402(a)(1) that permits could be issued and conditions specified on a case-by-case basis prior to the promulgation of guidelines. See *United States Steel Corporation* v. *Train*, 556 F.2d 822, 844, 854 (7th Cir. 1977). Thus, whether or not guidelines for a particular industry have been promulgated, where, as here, a permit is issued on a case-by-case determination of best practicable control technology, that technology level must be achieved by July 1, 1977. *Bethlehem Steel Corporation* v. *Train*, 544 F.2d 657 (3d Cir. 1976), cert. denied, 430 U.S. 975 (1977); *United States Steel Corporation* v. *Train*, *supra*. The court of appeals was therefore correct in concluding that "the July 1, 1977, deadline cannot be waived by the courts" (Pet. App. 5a). Cf. *Union Electric Company* v. *EPA*, 427 U.S. 246, 269 (1976); *State Water Control Board* v. *Train*, 559 F.2d 921 (4th Cir. 1977).[4]

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[3] See, *e.g.*, *Natural Resources Defense Council, Inc.* v. *Train*, *supra*, 510 F.2d at 710-711 ("[t]he statutory framework is not so tightly drawn as to require guidelines for each and every class and category of point source * * *").

[4] We discussed this issue at somewhat greater length in our petition in *Costle* v. *Republic Steel Corp.*, No. 77-631, *cert. granted and judgment vacated*, 434 U.S. 1030 (1978). Petitioner's inability to meet the July 1, 1977, best practicable technology deadline is the rare exception rather than the rule. Despite the absence of timely promulgated guidelines under Section 304 for most major industrial categories, approximately 90% of major industrial dischargers were able to meet the 1977 deadline. See S. Rep. No. 95-370, 95th Cong., 1st Sess. 62 (1977).

2. The Clean Water Act of 1977, Pub. L. No. 95-217, reinforces this conclusion. In enacting this legislation, Congress shared with the Administrator and the court of appeals the concern that instances might arise in which the July 1, 1977, deadline would work hardship on some dischargers unable to comply with the Act despite good faith efforts. The appropriate remedy for this situation was a major topic in the congressional debates.

On April 5, 1977, the House of Representatives passed H.R. 3199, amending the Federal Water Pollution Control Act Amendments of 1972. Section 13 of that bill would have amended Section 301 of the 1972 Act to allow case-by-case extensions of the July 1, 1977, deadline in NPDES permits for industrial and municipal dischargers. H.R. Rep. No. 95-139, 95th Cong., 1st Sess. 15, 41 (1977); see also 123 Cong. Rec. H3026-H3030 (daily ed. Apr. 5, 1977). Four months later, the Senate also approved amendments to the Act when it adopted S. 1952. See 123 Cong. Rec. S13534-S13629 (daily ed. Aug. 4, 1977). While the Senate agreed with allowing deadline extensions in NPDES permits for municipalities, it rejected this approach for industrial polluters. Instead, the Senate bill authorized the Administrator,

as the person primarily responsible for enforcement of the Act, to issue orders under Section 309 to extend the industrial compliance deadlines in limited circumstances. See S. Rep. No. 95-370, 95th Cong., 1st Sess. 62 (1977); 123 Cong. Rec. S13538, S13552 (daily ed. Aug. 4, 1977).

The Senate approach eventually prevailed in the final legislation. See H.R. Rep. No. 95-830, 95th Cong., 1st Sess. 75-78, 88-90 (1977). The Clean Water Act of 1977 amended Section 301 to allow case-by-case extensions of the deadline in NPDES permits for municipalities and added Section 309(a)(5)(B) to authorize the Administrator to issue discretionary orders in limited circumstances to extend the deadline for industrial polluters until April 1, 1979.[5]

If, as petitioner argues, the 1972 Act authorized extensions of the best practicable technology deadline in NPDES permits, this legislative activity would have been unnecessary. However, the 1972 Act and the Clean Water Act of 1977 must be read together "as part[] of an integrated whole" (*Markham* v. *Cabell*, 326 U.S. 404, 411 (1945)) and must be given "the most harmonious, comprehensive meaning possible." *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480,

[5] The text of Section 309(a)(5)(B) is set out at Pet. App. 40a. This provision is essentially a codification of an enforcement policy developed by the Agency in 1976. See S. Rep. No. 95-370, *supra*, at 60-61; 123 Cong. Rec. S13552 (daily ed. Aug. 4, 1977); 123 Cong. Rec. S19650 (daily ed. Dec. 15, 1977).

488 (1947). Acceptance of petitioner's view, as the court of appeals noted, "would not only render § 309(a)(5)(B) largely meaningless, but also would defeat Congress' clearly expressed intent in enacting that section" (Pet. App. 6a). The court below was thus correct in holding that the Section 301 implementation deadline could not be extended in petitioner's permit and that Section 309(a)(5)(B) provides the sole avenue of relief.[6]

3. Petitioner contends (Pet. 12-14) that the court of appeals erred in giving "retroactive" effect to the 1977 amendments to the Act. This claim is insubstantial.

In the first place, the 1977 amendments do not alter the preexisting requirement that dischargers meet the July 1, 1977, deadline and thus do not impose any new obligations. As the Senate Report on the 1977 amendments stated (S. Rep. No. 95-370, *supra*, at 60):

[6] Petitioner contends (Pet. 11-12) that a Section 309(a)(5)(B) order is discretionary and, even if issued, would not provide the same relief as an extension of the July 1, 1977, deadline in its permit. Contrary to petitioner's speculation, we doubt that a discharger would be subject to judicially imposed penalties if the Administrator were to grant it relief under Section 309(a)(5)(B). See *State Water Control Board* v. *Train*, *supra*, 559 F.2d at 927-928. In any event, petitioner's dissatisfaction with Section 309(a)(5)(B) is not a controlling consideration. Congress concluded that "[t]his amendment responds to the legitimate concern of dischargers who, despite good faith efforts, will not comply with the 1977 requirements." S. Rep. No. 95-370, *supra*, at 60.

> Under existing law there are no circumstances that justify a time for compliance extending beyond July 1, 1977 * * *. Thus, the decision of the U.S. Court of Appeals for the Sixth Circuit in [*Republic Steel I*] was an incorrect interpretation of existing law.

The 1977 legislation is persuasive evidence of the congressional intent in adopting the complex provisions of the 1972 Federal Water Pollution Control Act Amendments. See *NLRB* v. *Bell Aerospace Company*, 416 U.S. 267, 275 (1974); *Red Lion Broadcasting Company, Inc.* v. *FCC*, 395 U.S. 367, 381 (1969). Congress clearly intended Section 301 to establish an inflexible July 1, 1977, compliance deadline for all dischargers subject to the Act.

Apart from the light it shed on the 1972 Act, the Clean Water Act of 1977 was the law to be applied to petitioner's case. The court of appeals properly looked to the law in effect at the time of its decision in the absence of any "manifest injustice" or inconsistent statutory directive (Pet. App. 8a-11a). See *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974). Petitioner cannot claim that it lacked fair warning of the mandatory July 1, 1977, deadline. Prior to the *Republic Steel I* decision on June 23, 1977, the Agency had consistently taken the position that compliance with the July 1, 1977, deadline in discharge permits was mandatory (Pet. App. 10a). Moreover, as the court of appeals observed (*id.* at 11a; footnote omitted):

> In any event, Republic does not seriously claim that its noncompliance with the July 1, 1977, deadline is the result of an honest belief that the deadline was invalid. Rather the company maintains that it was unable to meet the deadline, despite good faith efforts, because of the absence of [best practicable technology] guidelines from EPA. If this is true, then the new § 309(a)(5)(B) procedure can provide any justified relief.

4. Finally, there is no conflict among the circuits requiring resolution by this Court. The decision below is consistent with rulings in the other courts of appeals. See *Bethlehem Steel Corporation* v. *Train*, *supra*; *United States Steel Corporation* v. *Train*, *supra*. Cf. *State Water Control Board* v. *Train*, *supra*. While the Ninth Circuit reached a contrary conclusion in *Washington* v. *EPA*, 573 F.2d 583 (9th Cir. 1978), that court, as the court below noted (Pet. App. 7a), failed to consider the impact of the Clean Water Act of 1977. Absent a conflicting construction of the Act as affected by the 1977 amendments, there is no need for this Court to consider the issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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